

DICKSTEINSHAPIROLLP

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October 11, 2007

Office of the Judge Advocate General (Code 14)
1322 Patterson Avenue, S.E.
Suite 3000
Washington Navy Yard
Washington, D.C. 20374-5066

Re: **Freedom of Information Act Appeal**
NCIS File No. 5720 F07-0970

Dear Sir/Madam:

I submit this appeal on behalf of Dickstein Shapiro LLP pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. This appeal is timely, as it is postmarked within 60 days after the date of the initial denial of my request, attached hereto as Enclosure (1).

On June 14, 2007, I sought the following records on behalf of Dickstein Shapiro LLP:

All documents, including but not limited to photographs, video tapes, memoranda, reports, and electronic mail or other digital media, relating in any way to the detention at Guantanamo Bay, Cuba of Salah Ali Abdullah Ahmed Al Salami, whose ISN at Guantanamo Bay was 693, as well as all documents, including but not limited to photographs, video tapes, memoranda, reports, and electronic mail or other digital media, relating in any way to the death of Salah Ali Abdullah Ahmed Al Salami, ISN 693, at Guantanamo Bay in June 2006.

See Enclosure (2). On August 16, 2007, LCDR C.D. Connor stated in the Navy's response that "[t]he information you seek is currently exempt from disclosure because the investigation is still pending" and cited 5 U.S.C. § 552(b)(7)(A). See Enclosure (1).

I respectfully submit that the Navy's decision to withhold the requested information was in error. I base my appeal on the following three grounds:

- I. Exemption 7(A) does not apply to the requested information.
- II. The Navy failed to provide segregable, disclosable information from otherwise non-releasable records.
- III. The Navy failed to provide a reasonable estimate of the amount of withheld information.

EXHIBIT 4

DICKSTEINSHAPIRO_{LLP}

Office of the Judge Advocate General (Code 14)
October 11, 2007
Page 2

I. Exemption 7(A) does not apply.

Exemption 7(A) of the FOIA authorizes the withholding of “records or information compiled for law enforcement purposes, but only to the extent that such production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). To invoke the protection of Exemption 7(A), the government must prove two things: (1) that a law enforcement proceeding is pending or prospective, and (2) that the release of the requested information could reasonably be expected to cause some articulable harm. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 244 (1978).

The Navy has failed to meet either requirement. In its response, LCDR Connor simply stated that the investigation regarding the death of Salah Ali Abdullah Ahmed Al Salami is still pending. The Navy, however, has failed to describe this investigation with any specificity, much less prove that any such investigation will likely lead to a prospective law enforcement proceeding. The Navy also has failed to articulate any particular harm that could reasonably result from the disclosure of the requested documents. The Navy, therefore, has not met its burden in justifying nondisclosure of the requested information.

II. The Navy has failed to provide segregable, discloseable information.

The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). In the Navy’s response, LCDR Connor did not indicate whether there had been a review of the records to determine whether there existed any reasonably segregable information that must be released by law. Nor did LCDR Connor specifically state that it was not reasonable to segregate portions of the record for release. Even if Exemption 7(A) authorizes the withholding of some of the requested information, the Navy still must review the documents and produce reasonably segregable documents or portions of documents.

III. The Navy has failed to estimate the volume of denied information.

The FOIA requires an agency, when it denies an initial request in full or in part, to “make a reasonable effort to estimate the volume of any requested matter” which is denied, and to “provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption” pursuant to which the denial is made. 5 U.S.C. § 552(a)(6)(F). In the Navy’s response, LCDR Connor did not provide such an estimate, did not indicate whether a reasonable effort had been made to make such an estimate, and did not state that providing such an estimate would harm an interest protected by Exemption 7(A). The Navy either should provide this information or should articulate the interest that would be harmed by providing such an estimate.

DICKSTEINSHAPIROLLP

Office of the Judge Advocate General (Code 14)

October 11, 2007

Page 3

For these reasons, I respectfully appeal the denial of my initial request for information relating to the detention and death of Salah Ali Abdullah Ahmed Al Salami. I request a response to this appeal within 20 working days.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa M. Kaas", written in a cursive style.

Lisa M. Kaas

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Enclosures:

- (1) Letter from LCDR C.D. Connor, Naval Criminal Investigative Service, dated 8/16/07
- (2) FOIA Request Confirmation, dated 6/14/07